USE OF MOCK-UPS IN TELEVISION ADVERTISING UPHELD

Colgate-Palmolive Company v. Federal Trade Commission
310 F.2d 89 (1st Cir. 1962)

The Federal Trade Commission, acting under section 5 of the Federal Trade Commission Act,[1] issued a cease and desist order against television commercials which advertised the "moisturizing" qualities of Colgate-Palmolive "Rapid Shave." The commercial involved a demonstration of the product where it was applied to what appeared to be coarse sandpaper. The "sandpaper" was shaved clean with a safety razor immediately after the application. The "sandpaper" was in fact a mock-up or simulation composed of sand on plexiglass. If actual sandpaper were used in this demonstration, it would appear to be simply colored paper, due to the technical problems of television photography. According to the court of appeals, the mock-up was misrepresentation within the prohibition of the Act, and a cease and desist order was justified. However, the court set aside the FTC's order as being too broad on the basis, *inter alia*, that it could be interpreted to prohibit the use of television mock-ups or substitutions of any sort, and the court found that this was in fact the intention and policy of the FTC.[2] The court was unable to find any misrepresentation to the viewer in a case where a substitution was made solely to compensate for the inherent limitations of television photography.[3]

This case is the first on the subject of television mock-ups to reach the federal courts, although the question has been before the Commission often.[4]

---

[1] 38 Stat. 717 (1914), 15 U.S.C. § 41 (1958).

[2] Colgate-Palmolive Company v. Federal Trade Commission, 310 F.2d 89, 93 n.6 (1st Cir. 1962). To test the Commission's position, the court proposed the following hypothetical situation to counsel for the Commission: A prominent person who actually liked "Lipsom's Tea" was photographed while drinking colored water which appeared on the screen to be tea. When asked if the Commission would consider the use of colored water to be misconduct, counsel answered that the Commission's position was that it would, since the viewer was led to believe he was seeing tea when in fact he was not.

[3] *Id.*

[4] 79 B.N.A. Antitrust & Trade Reg. Rep., B-1 (1963). The rigidity of the FTC policy against any sort of deception can be traced back to November 2, 1959 when Chairman Earl W. Kintner stated the Commission's intent to "turn off the spigot of chicanery at its source with the handiest wrench that will fit the task." Results of this policy change were immediate. On November 22, 1959 a complaint against the "protective shield" advertisement for "Colgate Dental Cream" was issued, based on deception. On December 14, 1959 a complaint was filed alleging that a demonstration of the filter in "Life" cigarettes did not prove what it purported to prove, and a consent order was issued on February 24, 1960. On January 15, 1960 four complaints were announced against deceptive demonstrations by the manufacturers and advertising agencies of nationally advertised products, including the complaint resulting in the instant case. Colgate-Palmolive Co. (Docket 7736). Another complaint followed on March 24, 1960

The policy of the FTC against substitutions or demonstrations which are not genuine, even though they portray to the viewer an accurate impression of the qualities of the product, was held to be unwarranted. The court reasoned that if there had been no misstatement of the facts about the product, or misrepresentation of its appearance, the use of a substituted material or mock-up should not be illegal per se.[5]

The purpose of section 5 of the Federal Trade Commission Act is two-fold: to protect the public against misleading advertisements;[6] and, to eliminate methods of competition which are considered to be unfair.[7] Presumably, the same standards apply to all advertisers. Consequently, if there is a misrepresentation by one advertiser which induces a segment of the public to purchase the product as a result of the misrepresentation, there is unfair competition in that sales have been lost by competing firms who have conformed to the standards set forth by the FTC.[8] In addition, the buyers of the product who relied on the advertisement did not receive what they thought they were buying, and were injured to the extent of their reliance.[9]

Through the Wheeler-Lea Amendment in 1938, the emphasis on protection of competition was abandoned.[10] In adding the words "unfair or deceptive acts or practices" to the Act, the amendment codified the judicial trend that the Act should afford direct protection to the buying public as well.[11]

The position of the FTC is supported by several arguments, and there are certain policy reasons why an affirmance of that position might well be advantageous to all concerned. Advertising in general, particularly through the medium of television, has become a powerful force in our economy and in the lives of the American people. The purpose of advertising is to influence the public to buy the product advertised, and the motivation on which advertisers rely is not generally need or utility. Often appeal to the desire

---

against Eversharp, Inc. (Docket 7811), alleging that a demonstration of competitive razors cutting the surface of a boxing glove unduly frightened prospective buyers of the competitive razors. On June 26, 1960 a complaint alleging a substitution in a demonstration of a competing product was issued against Carter Products, Inc. (Docket 7943), involving "Rise Shaving Cream," and the case is now pending before the Court of Appeals for the Fifth Circuit. Most of these cases have resulted in consent orders, without admitting any violation of the law.

[5] Colgate-Palmolive Company v. Federal Trade Commission, *supra* note 2, at 94.

[6] Aronberg v. Federal Trade Commission, 132 F.2d 165 (7th Cir. 1942).

[7] Butterick Pub. Co. v. Federal Trade Commission, 85 F.2d 522 (2d Cir. 1936).

[8] Federal Trade Commission v. Raladam Co., 316 U.S. 149 (1942); Federal Trade Commission v. Winsted Hosiery Co., 258 U.S. 483 (1922).

[9] Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67 (1934).

[10] Moore, "Deceptive Trade Practices and the Federal Trade Commission," 28 Tenn. L. Rev. 493, 497 (1961).

[11] 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45(a)(1) (1952) provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are declared unlawful.

See H.R. Rep. No. 1613, 75th Cong., 1st Sess. 1 (1937); Note, "The Regulation of Advertising," 56 Colum. L. Rev. 1018, 1022 (1956). See generally, Barnes, "False Advertising," 23 Ohio St. L.J. 597 (1962).

for social success or prestige is the basis of the "pitch."[12] Thus the influence on the public character may be somewhat less than beneficial.

Since a substitution or mock-up is, in the narrowest sense, a misrepresentation as to what is actually being viewed, why should the FTC or the courts extend to advertisers the privilege of making this misrepresentation? There is certainly no right to disseminate misleading advertisements.[13] In addition, the problems of enforcement of the Act would be greatly simplified by an insistence on genuineness, since there would be no critical judgments required to determine whether the substitutions or mock-ups, if allowed, created an accurate net impression in the minds of the viewing public. If the advertisers have problems in photography or in any other regard, why should they be allowed to resort to misrepresentations in order to solve them?

From the standpoint of the companies who are selling the products, there is good reason to believe that from a long-range point of view, a strict policy against substitutions would increase, rather than decrease, sales. If the public were made aware of the fact that advertising was required to be absolutely accurate and genuine, public confidence in television demonstrations should eventually improve. It is very likely that there is a large and skeptical body of the American people who pay no attention to television advertisements unless it is absolutely unavoidable. If properly handled and made public, the fact that advertisements must be genuine or not be shown would tend to influence these skeptics to be more disposed to the products shown on television.

For good reasons, the court was not persuaded by such arguments in the instant case. Regardless of the medium employed in the dissemination of an advertisement, the test of falsity is the net impression which the advertisement is likely to make on the general public.[14] Section 15 of the Federal Trade Commission Act defines the term false advertisement as meaning an advertisement "which is misleading in a *material* respect." (Emphasis added.)[15] Keeping these two principles in mind, the issue should be confined to the question of whether or not an advertisement is materially misleading to the viewing public where any substitution is used in demonstrating the product, even though there is no exaggeration of the qualities of the product. In the instant case, the FTC took the position that a sponsor takes liberties with the truth which amount to misconduct when the viewer is led to believe, for example, that he is seeing iced tea when in fact he is seeing colored water, even though the colored water appears on the viewer's television set exactly as iced tea would appear on the dinner table.[16] It is difficult to see how an

[12] *E.g.*, The current men's hair oil advertisement to the effect that if you use "a little dab" of "Bryl Creme" "the girls will all pursue ya."

[13] E.F. Drew & Co. v. Federal Trade Commission, 235 F.2d 735 (2d Cir. 1956).

[14] Charles of the Ritz Distributors Corp. v. Federal Trade Commission, 143 F.2d 676 (2d Cir. 1944).

[15] 52 Stat. 116 (1938), 15 U.S.C. § 55(a)(1) (1952).

[16] Colgate-Palmolive Company v. Federal Trade Commission, *supra* note 2.

advertisement which presents a completely accurate impression of the appearance and capabilities of a product can cause anyone viewing it to be misled. The fact that the viewer believes he is seeing iced tea or sandpaper, when in fact he is seeing something else, would certainly not influence his decision to purchase the product if it were known that the qualities of the product had been accurately portrayed. The test as to the falsity of an advertisement deals with the subjective effect on the viewer, and it is not significant in that respect, that the mock-up at which the camera is directed is not precisely what the viewer is led to believe.

The public is entitled to buy what it thinks it is buying.[17] However, where a mock-up is used merely to demonstrate qualities which the product actually possesses, the purchasing public does get precisely that which was apparently advertised, and neither buyer nor competitor has been injured by the substitution.

[17] In the matter of Hutchinson Chem. Corp., 55 F.T.C. 1942 (1959).